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In the Supreme Court of the United States

OCTOBER TERM, 1957

ANTHONY J. DEBERNARDO, PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 17) is reported at 254 F. 2d 81.

JURISDICTION

The judgment of the Court of Appeals was entered on March 27, 1958 (Pet. 19). The petition for a writ of certiorari was filed on June 3, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether petitioner, who claimed inability to secure counsel, was denied due process of law because he was not represented by counsel at a deportation hearing, although his case involved no disputed factual issue

and the administrative determination of the legal issue presented was subsequently passed upon by two courts in proceedings in which petitioner was represented by counsel.

STATUTES AND REGULATIONS INVOLVED

Section 19 of the Immigration Act of 1917, 39 Stat. 889, provides in pertinent part:

> * * * [A]ny alien who is hereafter sentenced to imprisonment for a term of one year or more * * * or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported * * *.

Section 242 (b) (2) of the Immigration and Nationality Act of 1952, 66 Stat. 209, 8 U. S. C. 1252 (b) (2) provides:

> [T]he alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

Section 6 (a) of the Administrative Procedure Act of 1946, 60 Stat. 240, 5 U. S. C. 1005 (a) provides in pertinent part:

> SEC. 6. Except as otherwise provided in this Act—(a) APPEARANCE.—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. * * *

8 C. F. R., 1951 Supp., 151.1 (15 F. R. 7637) provides in pertinent part:

> After the alien has been taken into custody under a warrant of arrest and has been given a reasonable period of time to arrange for the presentation of his case, including if desired, representation by counsel, the case of the alien shall be referred to an appropriate officer for hearing to determine whether the alien is subject to deportation. * * *

8 C. F. R., 1951 Supp., 151.2 (c) (15 F. R. 7637) provides in pertinent part:

> At the commencement of the hearing under the warrant of arrest, the hearing officer shall * * * (3) advise the alien, if not represented by counsel or other qualified representative, that he may be so represented if he desires and require him to state then and there for the record whether he desires such representation. * * *

STATEMENT

Petitioner, an alien, brought suit, in 1955, in the United States District Court for the District of Columbia, for a declaratory judgment that a deportation order against him was void, claiming that he did not have counsel at his immigration hearings and that the administrative determination that the crime of unlawful entry involved moral turpitude was contrary to law (R. 1–4). The court sustained the validity of the order, finding that petitioner had properly been held deportable under the Immigration Act of 1917 for committing, after entry, more than one crime involving moral turpitude (*i. e.*, unlawful

entry into a building, robbery in the third degree and robbery in the second degree). It ruled that, since petitioner had been afforded ample opportunity to obtain counsel, he was not denied due process in the deportation hearings (R. 11). The Court of Appeals affirmed, sustaining the deportation order on the basis of the two crimes of unlawful entry and robbery, third degree (Pet. 18). The Court of Appeals found it unnecessary in this case to decide whether due process would require that counsel be appointed for an indigent in a deportation hearing, pointing out that the facts were not in dispute and that the legal issue was ultimately determined in court proceedings at which petitioner was ably represented (Pet. 18).

The facts are as follows:

1. Petitioner, a native and citizen of Italy was admitted into this country for permanent residence in 1912 (R. 21–22). Since that time, he has resided here continuously (R. 22).

In 1927, petitioner was indicted in New York State for the crimes of burglary, third degree, grand larceny in the second degree and criminally receiving stolen property. He was allowed to plead guilty to the crime of unlawful entry[1] and was sentenced to the New York City Reformatory for an indefinite term of imprisonment, the maximum being three years (R. 10, 14, 16, 22–24). In 1931, petitioner was

[1] Section 405 of the New York Penal Code then in force, defined unlawful entry of a building as follows (R. 14–15):

"A person who, under circumstances or in a manner not amounting to burglary enters a building or any part thereof, with intent to commit a felony or a larceny, or any malicious mischief, is guilty of a misdemeanor."

again convicted by a state court—this time for robbery in the third degree while armed. He was sentenced to the state prison for a term of 15 years (R. 10, 15–16, 24–25). A little more than a year later he escaped (R. 25). In September 1932, he was indicted for the crime of robbery in the first degree, allegedly committed in August 1932. He withdrew a plea of not guilty to this charge, entered a plea of guilty and was sentenced to the state prison for a term of 15 years, the sentence to commence at the completion of his previous 15-year sentence (R. 10, 16, 17, 25–26).

2. In February 1932, a warrant of arrest for deportation was issued charging that petitioner was deportable under Section 19 of the Immigration Act of 1917, in that twice after entry he had been sentenced to imprisonment for crimes involving moral turpitude, *i. e.,* robbery in the third degree and unlawful entry (R. 19). After a hearing at which petitioner stated that he did not desire counsel and admitted the charges, he was ordered deported, such deportation to be deferred until his release from prison (R. 11). In July, 1952, the Board of Immigration Appeals, upon a motion by petitioner, ordered that the order and warrant of deportation be withdrawn, and that the proceedings be reopened for the purpose of ascertaining whether the crime of unlawful entry involved moral turpitude (R. 8, 11, 18, 32). The Board advised petitioner of this order on July 13, 1952, and on September 5, 1952, it notified him of the time and place of the reopened hearing (R. 18). At this hearing in Clinton State Prison, New York, on September

12, 1952, petitioner was advised of his right to be represented by counsel or by any other qualified person. In answer to an inquiry, he stated that he would not like to proceed without counsel (R. 19). The inquiry officer granted a postponement and the following colloquy took place (R. 19–20):

> Q. You are informed that in view of the fact that you desire to be represented by counsel at the hearing, your hearing is adjourned today to afford you an opportunity to obtain representation, with the understanding that when your reopened hearing date is set in the near future, that the hearing will be proceeded with, with or without counsel. Do you understand that?
>
> A. Yes.

On February 5, 1953, after notice to petitioner, his hearing was reconvened and the following colloquy took place (R. 20–21):

> Q. At that time [September 12, 1952] the hearing was adjourned to afford you an opportunity to obtain counsel if you so desire, and you were placed on notice that if you did not desire to obtain counsel, that the hearing would be proceeded with at the next date it was set?
>
> A. That's right.
>
> Q. Have you obtained counsel?
>
> A. I had a visit here on September 27 and 28 of 1952 and told my family. They cannot retain counsel, they have no money.
>
> Q. Are you ready and willing to proceed with the reopened hearing at this time without representation?

A. Well, I have no counsel.

Q. I show you copy of letter sent to you January 26, 1953 notifying you of the time and place of reopened hearing in your case. Did you receive the letter?

A. Yes, I have it.

Q. Letter dated January 26, 1953 notifying you of the time and place of hearing in your case is entered of record as Exhibit #5. Do you understand?

A. Yes.

The hearing proceeded, at which time petitioner read the transcript of his deportation hearing held in 1932 (R. 21). He identified a copy of the indictment which resulted in his 1927 conviction for unlawful entry and admitted his plea of guilty (R. 22, 24). He identified a copy of the record of his 1931 conviction and sentence for the crime of robbery in the third degree while armed (R. 24–25). He told the inquiry officer that he was attacking these two convictions in the appellate courts of New York and that he also intended to attack a third conviction—a 1932 conviction for robbery in the second degree, which he brought to the officer's attention (R. 24, 25, 26). When the inquiry officer suggested an adjournment to permit the government to secure records of this third conviction, petitioner volunteered to supply his own records, which he did (R. 27–28). On the basis of this evidence the officer lodged an additional charge, the following colloquy taking place (R. 29):

Q. You are advised that should you desire to obtain an attorney or other qualified person

to represent you on this charge, permission for the continuance of the hearing will be granted. Do you desire representation?

A. From the start, on September 12, I stated I would like a counsel. However, I received a visit here in September and I explained to my people. They have no funds to retain a counsel for me. I have no funds to retain a counsel for me. Being as you wanted to go ahead with the hearing whether I had representation or not, I am going ahead with the hearing.

Q. Do you desire additional time in which to prepare a defense against this lodged charge?

A. No. I told you about this charge, which you didn't know anything about. I brought up these records and gave them to you.

Q. Did you surrender these copies willingly?

A. Yes, naturally.

The Special Inquiry Officer entered his decision on February 25, 1953 (R. 14), concluding that petitioner was deportable under the 1917 Act for the commission, on three occasions, of crimes involving moral turpitude—unlawful entry, robbery in the third degree and robbery in the second degree (R. 17). The Board of Immigration Appeals dismissed an appeal on July 2, 1953 (R. 31–33).

ARGUMENT

Petitioner does not challenge the ruling that the crimes on which his deportation order rests involve moral turpitude. He does not deny that he was informed of his right to be represented by counsel and that he was given adequate opportunity—more than four months after the date of the reopened hear-

ing—to obtain counsel. Moreover, as the courts below noted, petitioner's deportability did not turn upon any disputed issues of fact. Petitioner's convictions were a matter of record, and the only possible issue was whether one of the crimes involved moral turpitude.[2] This issue of law, while initially determined administratively, was ultimately determined in judicial proceedings for review, in which petitioner has been ably represented by experienced counsel.[3] Under these circumstances, the courts below properly held, as other courts have held in analogous situations, that the fact that petitioner was not represented by counsel did not render the hearing unfair. See *Dengeleski* v. *Tillinghast,* 65 F. 2d 440 (C. A. 1); *United States ex rel. Wiczynski* v. *Shaughnessy,* 185 F. 2d 347 (C. A. 2); *Sumio Madokoro* v. *Del Guercio,* 160 F. 2d 164 (C. A. 9); *In re Raimondi,* 126 F. Supp. 390, 394 (N. D. Calif.). See, also, *Mealha* v. *Shaughnessy,* 219 F. 2d 600 (C. A. 2); *United States ex rel. Castro-Louzan* v. *Zimmerman,* 94 F. Supp. 22, 25–26 (E. D. Pa.).

The absolute right to be represented by counsel in criminal proceedings, guaranteed by the Sixth Amendment, does not extend to deportation hearings since it is settled that deportation proceedings, no matter the severity of their consequences, are civil

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[2] In view of petitioner's experience with the law and the fact that he was apparently attacking his judgments of conviction, it seems doubtful that he would not have known of legal aid services.

[3] This question is obviously one for the courts and not one in which administrative expertise plays a role.

and not criminal. *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 594.

An alien, of course, is entitled to due process under the Fifth Amendment; he may not be deported without a fair opportunity to be heard. *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, 596–598; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 49, 50. However, the fact that he did not have counsel is not in and of itself a violation of due process. Even as to state criminal proceedings, this Court has held that due process does not require the appointment of counsel in every case. *Bute* v. *Illinois*, 333 U. S. 640. Congress has not provided for assignment of counsel as of course in deportation hearings. Neither the Administrative Procedure Act (Section 6 (a)) nor immigration legislation requires more than that a party have a right to counsel and to be apprised, as petitioner was, of such right (see p. 6, *supra*).[4] The standard of due process is the standard of fairness. Only where the circumstances are such that absence of counsel serves to render a hearing unfair can a deportation order be set aside because the alien was

[4] Hearing officers have no authority to assign counsel.

not represented. That, as noted above, is not this case. The bare legal question whether the crimes of which petitoner was admittedly convicted fall within the concept of crimes involving moral turpitude—a question which petitioner does not seek to litigate further—has been considered by both courts below in the course of proceedings in which petitioner was fully and ably represented by counsel.[5]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[5] In an endeavor to show the necessity for counsel, petitioner suggests that counsel might have applied for discretionary relief. He does not show that he is foreclosed from seeking such relief now. Deportation proceedings may be, and frequently are, reopened upon a proper showing.